

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN RIGHTS

Christine Hernandez
Charging Party,

**ORDER ON MOTION
FOR SUMMARY DISPOSITION**

v.

Minnesota Correctional Facility,
- Oak Park Heights,
Respondent.

The above-entitled matter came before Administrative Law Judge Steve M. Mihalchick on Respondent's Motion for Summary Disposition. The Respondent filed its motion on August 22, 2003. The Charging Party filed her reply on September 2, 2003, at the time of oral argument. Respondent was allowed to file a response and did so on September 4, 2003. The record was closed on that date.

Christopher R. Walsh, Walsh Law Firm, 270 Grain Exchange North Building, 301 Fourth Avenue South, Minneapolis, MN 55415, appeared on behalf of Charging Party. Yvonne Shorts, Assistant Attorney General, 445 Minnesota St, Suite 1100, St. Paul, MN 55101-2128 appeared on behalf of Respondent.

Based upon all of the file, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that Respondent's Motion for Summary Disposition on Charging Party's claim of sex discrimination in public service is DENIED.

Dated this September 9, 2003.

/s/ Bruce H. Johnson for

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

Underlying Facts¹

Charging Party alleges in her charge and deposition² that she was discriminated against by an employee of Respondent on two occasions while she was working at the prison as a construction laborer for a construction contractor. She is a 39-year-old single parent. She had worked at the prison as a Corrections Officer Trainee from December, 1999, to July, 2000, but was not certified for permanent employment.

In December, 2001, Charging Party received a referral from her union to work for Arkay Construction, which assigned her to its ongoing construction project at the prison. She started there December 17, 2001. She had to check in with the guard in a guard shack. While she was there, he would go out occasionally to let other construction workers in, all of whom were male. At some point the guard, Sgt. Rutton, told her she would have to be strip searched before going in. She asked if they had a female guard. He said, "No, we don't; I'll have to do it." He then left to let some other people in and she pondered what she would do. She took the statement very seriously because they were in a prison and not on a playground. She didn't know all the strip search policies and his statement was very believable to her and he did not seem to be joking. When he came back, she told him, "I'm not going to get naked every day; I'll leave." He responded that he liked to get a reaction out of people, and let her in. She didn't report the incident that day because she was afraid to.³

Charging Party worked that day and the next three without any incident in the guard shack. On the fourth day, December 20, 2001, Sgt. Rutton came by the area in which she was working while on his rounds. When he was near by, she said, "Nice day." He replied, "Bend over." She told him, "Kiss my ass." He replied, "Bare it and I will." She then tried to get away from him by going to the construction office trailer. He followed her and said, "Where did you work before, Hooters?" She responded that she had done security, had worked at the prison, and was "too awesome for Hooters; it's below me." She then reported the incidents. She could not bring herself to return to that worksite thereafter.⁴

On September 20, 2002, Charging Party filed a Charge of Discrimination charging that she was discriminated against in the area of Public Services on the basis of Sex.

Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material

¹ The following description of the facts views the evidence in the light most favorable to Charging Party.

² Charging Party did not file an affidavit or other sworn testimony to supplement the testimony she gave in her deposition.

³ Hernandez Deposition at 50-54 and 60.

⁴ Charge of Discrimination; Hernandez Deposition at 55-57.

fact and one party is entitled to judgment as a matter of law.⁵ The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.⁶ A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.⁷

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute which have a bearing on the outcome of the case.⁸ A nonmoving party cannot rely on pleadings alone to defeat a summary judgment motion.⁹ The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.¹⁰ The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.¹¹

When considering a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party.¹² All doubts and factual inferences must be resolved against the moving party.¹³ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.¹⁴ Summary judgment should only be granted in those instances where there is no dispute of fact and where there exists only one conclusion.¹⁵

Public Service Discrimination

Minn. Stat. § 363.03, subd. 4(1) makes it an unfair discriminatory practice to discriminate against any person in the access to, admission to, full utilization of, or benefit from any public service because of sex, among other prohibited factors. "Public service" includes any public facility, department, or agency of the state or political subdivision.¹⁶ Respondent is therefore a "public service" itself.¹⁷ Moreover, the opportunity for employees of companies performing contract services for the Department of Corrections to work at the prisons is also a "public service," or at least a benefit of a public service.

⁵ *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1995); *Louwegie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. Rules, 1400.5500K; Minn.R.Civ.P. 56.03.

⁶ See, Minn. Rules 1400.6600 (1998).

⁷ *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

⁸ *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

⁹ *White v. Minnesota Dept. of Natural Resources*, 567 N.W.2d 724 (Minn. App. 1997).

¹⁰ *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

¹¹ *Carlisle*, 437 N.W.2d at 715, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

¹² *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).

¹³ See, e.g., *Celotex*, 477 U.S. at 325; *Thompson v. Campbell*, 845 F.Supp. 665, 672 (D.Minn. 1994); *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971).

¹⁴ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986).

¹⁵ *Id.*

¹⁶ Minn. Stat. § 363.01, subd. 34.

¹⁷ See, *City of Minneapolis v. Richardson*, 307 Minn. 80, 239 N.W.2d 197 (1976).

Viewing the facts in the light most favorable to Charging Party, Sgt. Rutton's statements on December 17 and 20, 2001, made submission to his sexual advances a condition of receiving a public service (employment by a contractor at the prison) and created an intimidating, hostile, or offensive environment for her at her workplace. Such conduct is sexual harassment as defined by Minn. Stat. § 363.01, subd. 41, and an unfair discriminatory practice. Respondent argues that the conduct was not severe or pervasive. It only happened twice, but she only worked there four days. Perhaps the only reason it was not more pervasive was because she was forced to quit. The conduct was very serious, particularly on the first day and under the situation of absolute control enjoyed by Sgt. Rutton and the confined location of the guard shack. His comments the last day built upon that. Her reactions and actions seem to be entirely reasonable.

S.M.M.